APPELLATE COURT

OF THE

State of Connecticut

JUDICIAL DISTRICT OF NEW HAVEN

A.C. 42327

STATE OF CONNECTICUT

V.

TYWAN EDWARDS

BRIEF OF THE STATE OF CONNECTICUT-APPELLEE
WITH ATTACHED APPENDIX

To Be Argued By:

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NATURE OF THE PROCEEDINGS

In connection with a robbery in New Haven on January 20, 2017,[1] the state charged the defendant, Tywan Edwards, with the following crimes: (1) burglary in the first degree, in violation of General Statutes § 53a-101(a)(1); (2) robbery in the first degree, in violation of General Statutes § 53a-134(a)(2); (3) conspiracy to commit larceny in the first degree, in violation of General Statutes § 53a-48(a) and 53a-122(a)(2); (4) assault in the second degree, in violation of General Statutes § 53a-60(a)(2); and (5) larceny in the second degree by receiving stolen property, in violation of General Statutes § 53a-119(8) and 53a-123(a)(2). Defendant's Appendix ("D/A") at A14-A15 (Information). After a trial in June 2018, *B. Fisher, J.*, presiding, the jury acquitted the defendant of the first four counts and convicted him of the fifth count. D/A at 3 (Judgment File). On August 31, 2018, the trial court sentenced the defendant to eight years in prison. Transcript ("T") 8/31 at 38.[2]

COUNTERSTATEMENT OF THE FACTS

From the evidence presented at trial, the jury could have found the following facts: In January 2017, the victims, Samantha Frank ("Samantha") and David Frank ("David") lived on Middletown Avenue in New Haven. T 6/18 at 25. In the afternoon of January 20, 2017, Dijon Edwards ("Dijon") came to the Franks' home and purchased Percocets from Samantha. T 6/18 at 87-88. Dijon, who is married to the defendant's brother, Terrance Edwards, was one of Samantha's regular Percocet customers. T 6/18 at 87. In getting change and pills for Dijon, Samantha opened a pouch that she keeps in her purse. T 6/18 at 31, 96-97. Dijon saw the

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[1] Although the attorneys and witnesses occasionally refer to the date of the robbery as January 21, 2017, the information states that it occurred on January 20, 2017, which is consistent with David Frank's testimony. *See* T 6/18 at 42; Defendant's Appendix ("D/A") at A14-A15. Thus, the state uses January 20, 2017, as the date of the robbery.

[2] All transcripts cited in the brief are from 2018.

contents of the pouch – money, jewelry, and medicine – and noticed that Samantha had some more Percocets. T 6/18 at 96-97. She asked Samantha to give her the additional pills on credit, but Samantha refused. T 6/18 at 95-96.

Later that night, David's cousin, Michael Frank ("Michael"), and his wife, Sally Merchon ("Sally") came for dinner at David and Samantha's house. T 6/18 at 32, 98. Just before dinner, Dijon called Samantha to ask if she and Samantha were "still okay," given their earlier disagreement. T 6/18 at 98. Samantha said "yes" and "sloughed it off...." *Id.*

Shortly after dinner, however, at approximately 9:30 p.m. on January 20, 2017, someone knocked on the back door, and David and Samantha went to answer it. T 6/18 at 98-101. When David partially opened the door, two men pushed their way into the kitchen. T 6/18 at 101. One was wearing a "half mask" that covered his mouth; the other, who was a larger man, did not have on a mask. T 6/18 at 33, 102. Armed with knives, the two men pushed Samantha and David through the kitchen and into the front room, where Michael and Sally were sitting. T 6/18 at 35, 102-03. The masked man held a knife to Michael's stomach. T 6/18 at 35. The unmasked man kicked Samantha to the ground and placed his booted foot on her back while he held a knife to David and demanded Samantha's purse. *Id.*

Sally picked up her purse and said, "[H]ere's a purse." T 6/18 at 35-6. The larger man said, "[N]o, the big purse." T 6/18 at 36. He became frustrated and lunged toward David's chest with his knife. *Id.* As he did, David turned, and the man stabbed him in his right shoulder. T 6/18 at 36-37. The unmasked man then looked as if he were going to stab Samantha in the back, so David directed the men to Samantha's big purse and told them to open the pouch within it. T 6/18 at 37-38. The men looked in the pouch then took it and David's wallet. T 6/18 at 38.

The pouch contained, among other things: (1) three of David's Rolex watches – one Daytona, which cost $11,000; one Datejust that was an Oyster Perpetual with a black face, worth $5,000; and a second Datejust, worth $16,000; (2) two bracelets, worth about $2,000 each; (3) a Rolex bracelet, worth about $400; (4) a white gold necklace and a heart pendent, together worth about $1,300; and (5) between $2,000 and $2,800 in cash. T 6/18 at 40-42. David's wallet had his license, social security card, a bank card, business cards, and about $200 in cash. T 6/18 at 42. As the intruders turned to walk out, they told the Franks that if the police were called, the men would return and kill them. T 6/18 at 38-39.

After the men left, David locked the back door, and Michael called the police. T 6/18 at 39. Officer Horatio Hinds of the New Haven Police Department responded to the scene and interviewed the Franks. T 6/19 at 30. He spoke to David briefly before the emergency medical technicians arrived and took David to the hospital, where he received stitches for his stab wound. T 6/18 at 39, 42; T 6/19 at 35-36, 38. David, who was bleeding and quite angry while Hinds was asking him questions, said that "two [f'ing] monkeys came in and stabbed me, [f'ing] robbed us[,] and ran out the back door."[3] T 6/18 at 57-58; T 6/19 at 30, 35-37, 40. David reported that he thought one of the men was a person with whom he had had a dispute over a watch belonging to David's son.[4] T 6/18 at 58-59; T 6/19 at 31-32.

Samantha thought that she had recognized one of the intruders as being related to Dijon, so the following day, she called Marcel, another Percocet customer who was Dijon's

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[3] Hinds testified that David told him the thieves had taken $20,000 in cash and two Rolex watches, one of which had Malva diamonds in it and was worth $40,000. T 6/19 at 33, 40. At trial, David testified that the $20,000 estimate that he gave to Hinds covered the combined value of the cash and jewelry. T 6/18 at 70-71.

[4] Samantha also told Hinds that one of the suspects resembled a male who had been involved in an incident with her husband a month before the robbery. T 6/19 at 32.

friend. T 6/18 at 109-11. Marcel sent her Facebook pictures of Terrance Edwards, Dijon's husband, and the defendant, Terrance's brother. T 6/18 at 43,111. Both Samantha and David saw that the photos depicted the individuals who had robbed them. *Id.*

David called the police department on January 22, 2017 to show the police the Facebook pictures of the robbery suspects, and Detective Kealyn Nivakoff and her partner went to the Franks' home to view the photographs. T 6/18 at 44, 168, 170-71. David described what happened during the robbery as he led the detectives through the house. *Id.* That evening, David and Michael went to the police station to give formal statements to Nivakoff. T 6/18 at 171. Another officer administered double-blind, sequential photo arrays to David. T 6/18 at 171-72. With 100% certainty, David identified the defendant as the man who stabbed him and Terrance Edwards as the man wearing the mask.[5] T 6/18 at 49.

The following day, January 23, 2017, Samantha and Sally gave statements to the police. T 6/18 at 177. They were also shown double-blind, sequential photo arrays. *Id.* St.Ex. 17, 18. Samantha identified the defendant, with 95% certainty, as the perpetrator without the mask, and she identified Terrance Edwards, with 80% certainty, as the perpetrator who wore a mask. T 6/18 at 116-18; St.Ex. 10, 11. She also identified, a "filler" photograph – inserted in the array simply because it somewhat resembled the defendant's photograph – as depicting the individual who wore the mask during the robbery. T 6/18 at 118-20, 180; St.Ex. 12. At trial, however, Samantha clarified that only the defendant and Terrance Edwards were in her home on the night of the robbery and that she did not remember identifying a third

[5] David was shown three separate arrays: one with a photo of Terrance Edwards; a second that included the defendant's photo; and a third with a picture of Dijon Edwards, which David identified with 80% certainty. T 6/18 at 173-76. St.Ex. 2, 15-16. Michael was also shown some photo arrays; *see* T 6/18 at 177; but because he died before trial, he did not testify, and evidence of his identifications was not offered at trial. *See* T 6/18 at 28-29.

person. T 6/18 at 119-20. During her identification procedure, Sally identified, with 100% certainty, a filler photograph. St.Ex. 14.

The police learned that the defendant, Terrance, and Dijon might be found at 1374 Whalley Avenue in New Haven, and surveillance units kept watch there. T 6/18 at 181-82. On January 23, 2017, police officers found the defendant in that vicinity and discovered a card from the American Diamond Exchange ("Diamond Exchange") in his pocket. T 6/18 at 182-83; St.Ex. 19. Detective Nivakoff interviewed the defendant at the police station, who said that he and Terrance did not get along, but, on that particular day, he was supposed to meet Terrance for drinks. T 6/18 at 186-87. He explained that he had the card from the Diamond Exchange for a Michael Kors watch that he was wearing; T 6/18 at 187; but writing on the card stated: "Rolex Watch Appraisal $250." S.Ex. 19. The defendant was vague about where he was living and denied using Percocets, but he stated that Terrance used them. *Id.* He also spontaneously said that "people were able to identify people from Facebook," even though Nivakoff had not mentioned Facebook previously. T 6/18 at 189.

Nivakoff also interviewed Terrance Edwards. T 6/18 at 185. At the end of the interview, she looked inside his wallet and found a driver's license and a Social Security Card belonging to David. *Id.*; St.Ex. 5-A; 5-B; *see also* T 6/18 at 50-51 (David identifying St.Ex. 5-A and 5-B as his). Thereafter, Nivakoff obtained a search warrant for 1374 Whalley Avenue, and, on January 24, 2017, officers searched that residence where they found a Rolex Daytona and two pieces of jewelry. T 6/18 at 189-90; St.Ex. 6. David identified the Daytona as his and the other jewelry as belonging to Samantha. T 6/18 at 53; St.Ex. 6. In addition, police searched Dijon's phone pursuant to a warrant and found a photograph of someone holding one of David's watches. T 6/18 at 54-55, 191-92; St.Ex. 7.

That same day, Detective Nivakoff seized audio-video surveillance footage from the Diamond Exchange. T 6/18 at 190-91; T 6/19 at 14-20; St.Ex. 20. The video and accompanying audio depicted the following: The defendant and an unidentified man parked in the lot of the Diamond Exchange on January 23, 2017, and entered the outer door of the store. T 6/19 at 14-15; St.Ex. 20 (clips 1 and 2).[6] Just as they entered, the unidentified man handed the defendant two items that were later shown to be watches. St Ex. 20 (clip 2). The two men were admitted into an inner chamber and then into the showroom, where a salesperson greeted them. T 6/19 at 16-17; St.Ex. 20 (clips 3 & 4 [:10]).

Next, Kathleen Kirker, a gemologist at the Diamond Exchange, asked the defendant if she could help him. T 6/19 at 11; St.Ex. 20 (:14-:15). The defendant first showed her a smaller Rolex watch and said, "My Rolex broke." *Id.* (:25-:26). Kirker told him that "we don't carry watches here" but that David Schnee, who worked there, "might be able to take a look at it for you but he's not in right now. He's the only one who knows about Rolexes." *Id.* (:35-:48). The defendant then showed her a larger watch and asked if the store had a diamond checker because he wanted to be sure that the diamonds on the larger watch were real. *Id.* (:49-1:03). As Kirker examined the watch, which did not appear to have a black face, the defendant commented, "[I]t's a lot of diamonds...," and Kirker agreed. *Id.* (1:01-1:07). Kirker

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[6] State's Exhibit 20 was admitted as a full exhibit with no restrictions or limiting instruction. It consisted of four video clips. The first three clips were short and showed the defendant and his companion entering the store. The fourth clip was approximately five minutes and 20 seconds long and recorded the interaction between the defendant and a Diamond Exchange employee, Kathleen Kirker. Unless otherwise mentioned, all references to State's Exhibit 20 are to the fourth clip with notations to the approximate elapsed time of the video when various statements were made. No transcription was made of the audio portion of Sate's Exhibit 20. The statements in quotation marks represent the state's best efforts to reproduce what was said. The defendant concedes that he was the person shown in the Diamond Exchange video interacting with Kirker. *See* D.Br. at 7-8.

then took the watch into a back room, and the defendant drifted toward the doorway of that room. *Id.* (1:08-1:17, 1:55-1:57). When Kirker emerged, the defendant was there. *Id.* (2:17). Kirker nodded and smiled at him. *Id.* She and the defendant then discussed the process and cost of obtaining an appraisal for the larger watch. *Id.* (2:30-3:15). Kirker explained that the Diamond Exchange only does appraisals for insurance purposes and asked if the defendant was planning to sell the watch. S.Ex. 20 (2:30-2:46). The defendant quickly said, "Oh no, no...," then he asked Kirker for a card. *Id.* (2:47-2:50, 3:17-3:18). As Kirker walked behind the counter to retrieve one, he followed her and asked, "You tested all the diamonds, right?" *Id.* (3:19-3:25). She answered that she did not "test them all," but she assured him that the ones she looked at under the microscope "were definitely real." *Id.* (3:26-3:32). Kirker appeared to write information on her card, then gave it to the defendant, explaining that the fee for "the Rolex watch appraisal will be $250.00" and "you definitely need to call for an appointment."[7] *Id.* (3:52-3:58). The defendant asked a few more questions, which Kirker answered, and she reminded him to call for an appointment. *Id.* (4:02-4:45). He thanked her and left with his companion. *Id.* (4:45-5:08).

Detective Nivakoff showed the video to David, who confirmed that he recognized one of the watches shown as his diamond Rolex Datejust. T 6/18 at 53-54. Nivakoff testified at trial that David "was able to identify items in that video as his." T 6/18 at 192-93.

In February 2017, arrest warrants were issued for Terrance Edwards and the defendant, but the police were unable to find the defendant for many months. T 6/18 at 196-97. In November 2017, the defendant was located in Arizona and brought back to

[7] Thus, contrary to the defendant's assertion; D.Br. at 7; Kirker identified the brand of the second watch.

Connecticut.[8] T 6/18 at 197. The defendant waived his rights under *Miranda v. Arizona,* 384 U.S. 486 (1966), and agreed to speak to Detective Nivakoff. *Id.* He told her that he and his brother had an argument and were not on good terms. T 6/18 at 198. The defendant stated that Terrance owed him money and he had gone to see his brother, believing that he would be repaid in cash. *Id.* Instead, his brother gave him a Rolex watch, which the defendant took to get appraised at the Diamond Exchange. *Id.*

ARGUMENT

I. AMPLE EVIDENCE SUPPORTED THE JURY'S FINDING THAT THE VALUE OF THE PROPERTY THE DEFENDANT RECEIVED EXCEEDED $10,000.

As his second and third appellate issues,[9] the defendant asserts that the evidence was insufficient to establish that he received or retained stolen property with a value in excess of $10,000. He first contends that the evidence did not adequately reveal whether he possessed David's Datejust watch worth $16,000 or, instead, his other Datejust watch worth $5,000.[10] D.Br. at 13-16. Second, he claims that David's testimony as to the worth of his watches was insufficient to establish the value element for second degree larceny. D.Br. at 17-21. These two claims, which the state addresses together, must be rejected. Ample evidence supported the jury's finding that the defendant possessed the more expensive

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[8] There was no evidence at trial that the defendant fled to Arizona to escape arrest, and the trial court declined to give a consciousness of guilt instruction. T 6/19 at 3-4.

[9] The defendant challenges the sufficiency of the evidence as his second, third, and fourth issues in his appellate brief. D.Br. at 13-24. The state addresses those claims first because, if meritorious, they would resolve the appeal without the need for a retrial. Thus, the state responds to the defendant's second and third issues together in Section I of the Argument; to the defendant's fourth issue in Section II; to his first issue in Section III; to his fifth issue in Section IV; and to his sixth issue in Section V, *infra.*

[10] At times in his brief, the defendant incorrectly states that David testified that the Datejust without the black face was worth $11,000. *See, e.g.,* D.Br. at 13, 15. David clearly valued that watch at $16,000. T 6/18 at 41.

Rolex Datejust watch, and David's testimony provided an adequate basis for the jury to determine that the value of that watch exceeded $10,000.

A. Standard Of Review And Relevant Principles Of Law

1. Sufficiency

This Court applies a two-part standard in reviewing sufficiency of the evidence claims.

> First, [the Court] construe[s] the evidence in the light most favorable to sustaining the verdict. Second, [the Court] determine[s] whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt.

(Ellipses omitted.) *State v. Daniel B.*, 331 Conn. 1, 12 (2019).

The probative force of the evidence is not diminished because it consists, in whole or in part, of circumstantial evidence rather than direct evidence. *State v. Dubuisson*, 183 Conn. App. 62, 69, *cert. denied*, 330 Conn. 914 (2018). In fact, "circumstantial evidence may be more certain, satisfying and persuasive than direct evidence." (Internal quotation marks omitted.) *State v. Sienkiewicz*, 162 Conn. App. 407, 410, *cert. denied*, 320 Conn. 924 (2016).

> It is not one fact, but the cumulative impact of a multitude of facts [that] establishes guilt in a case involving substantial circumstantial evidence. In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical.

(Ellipses and internal quotation marks omitted.) *State v. Bonilla*, 317 Conn. 758, 765 (2015).

On appeal, this Court does "not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence," but rather, "whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." *Daniel B.*, 331 Conn. at 12. As this Court has not had the "opportunity to observe the conduct, demeanor, and attitude of the witnesses and to gauge their credibility," it does "not sit as a [seventh]

juror who may cast a vote against the verdict based upon [its] feeling that some doubt of guilt is shown by the cold printed record." (Internal quotation marks omitted.) *State v. Davis*, 180 Conn. App. 799, 806, *cert. denied*, 328 Conn. 941 (2018).

2. Larceny By Receiving Stolen Property

Under General Statutes § 53a-119(8), a "person is guilty of larceny by receiving stolen property if he receives, retains, or disposes of stolen property knowing that it has probably been stolen or believing that it has probably been stolen...." If the value of the property received, retained, or disposed of exceeds $10,000, the individual is guilty of larceny in the second degree. General Statutes § 53a-123(a)(2). "Value" means "the market value of the property ... at the time and place of the crime or, if such cannot be satisfactorily ascertained, the cost of replacement of the property ... within a reasonable time after the crime." General Statutes § 53a-121(a)(1).

B. Abundant Evidence Established That The Defendant Possessed The More Expensive Stolen Rolex Datejust.

When construed in the light most favorable to supporting the defendant's conviction for receiving stolen property, the evidence supported the jury's finding that the defendant possessed the more expensive of David's Datejust watches, the one he valued at $16,000. Contrary to the defendant's assertion that "there was a 50% chance that the watch identified by David Frank was worth $5,000, and a 50% chance that it was worth $16,000," several facts buttress the jury's finding that the defendant possessed the $16,000 Datejust.

David identified the watch shown in the video as his "diamond Datejust," explaining that he knew it was his by the dial. T 6/18 at 54. Although he had earlier testified that he had two Datejust watches that were stolen, one worth $5,000 and the other worth $16,000, he described the less expensive Datejust as having a "black face, oyster perpetual and oyster

band, late 80's model ... stainless." T 6/18 at 40-41. He did not mention diamonds in his description of the $5,000 watch. In addition, State's Exhibit 20 showed Kirker, the gemologist at the Diamond Exchange, examining the watch that the defendant handed her, and the watch did not appear to have a black face. Thus, it was reasonable for the jury to infer that the watch depicted in the video was not the $5,000 Datejust with a black face but the other Datejust that David testified was worth $16,000. *Bonilla*, 317 Conn. at 765 (finder of fact may draw whatever inferences from evidence it deems reasonable and logical).

Moreover, in the video, the defendant commented, and Kirker agreed, that the watch he handed her had "a lot of diamonds." St.Ex. 20 (1:01-1:07). When the defendant asked Kirker if she tested "all the diamonds," Kirker told him that she did not, but that the diamonds she did examine under the microscope were "definitely real." St.Ex. 20 (3:26-3:32). Using its common sense, the jury was permitted to infer that the watch the defendant asked Kirker to "test" had too many diamonds to examine quickly. *State v. Johnson*, 165 Conn. App. 255, 275 (jury properly relies "on its common sense, experience and knowledge of human nature in drawing inferences and reaching conclusions of fact" [internal quotation marks omitted]), *cert. denied,* 322 Conn. 904 (2016). The number and the genuineness of those diamonds that Kirker examined suggested that the Rolex watch shown in the video was worth more than $10,000. Thus, the evidence was sufficient for the jury to determine that the watch the defendant possessed, as shown in State's Exhibit 20, was David's more expensive Datejust.

C. David's Testimony Provided A Sufficient Basis For The Jury To Determine That The Stolen Watch Had A Value Of More Than $10,000.

The defendant argues that David's "single-sentence testimony that his property 'was worth' a certain amount" was insufficient to establish that the value of the watch that the defendant possessed exceeded $10,000. D.Br. at 17, 19. This claim, too, is without merit.

"Under the law in Connecticut, it is well settled that an owner may testify as to the value of his or her property." *State v. Sherman*, 127 Conn. App. 377, 393–94 (2011).

> [T]he competence of a witness to testify to the value of property may be established by demonstrating that the witness owns the property in question.... The rule establishing an owner's competence to testify reflects both the difficulty of producing other witnesses having any knowledge upon which to base an opinion especially where the stolen items are never recovered ... and the common experience that an owner is familiar with [his or] her property and knows what it is worth....

State v. Felder, 95 Conn. App. 248, 260–61, *cert. denied,* 279 Conn. 905 (2006).

The state can rely on an owner's estimate of the worth of his or her property. *State v. Spikes*, 111 Conn. App. 543, 551 (2008), *cert. denied,* 291 Conn. 901 (2009). "The state does not need to prove the value of property with exactitude.... [It] is required only to lay a foundation which will enable the trier [of fact] to make a fair and reasonable estimate." *Id.* at 551-52. "A reviewing court will not disturb the trier's determination [of value] if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Internal quotation marks omitted.) *State v. Browne*, 84 Conn. App. 351, 388, 271 Conn. 931, *cert. denied,* 271 Conn. 931 (2004).

Contrary to the defendant's claim here, an owner's testimony alone is often sufficient for the jury to find that the state satisfied the value element of a larceny charge. In *State v. Baker,* 182 Conn. 52, 62 (1980), for example, the victim of a burglary testified that the property stolen included six items of jewelry worth $4950 and four time pieces worth $1275. Our Supreme Court held that the owner's testimony "provided ample evidence for reasonable jurors to be convinced beyond a reasonable doubt that the market value of the stolen property exceed[ed] $6000." *Id.* at 63. Similarly, in *Felder,* 95 Conn. App. at 262, this Court held that

the owner's testimony of the worth of his stolen vehicle was alone sufficient for the jury to find that that its value exceeded $10,000, as required for second degree larceny. *See also Sherman,* 127 Conn. App. at 394 (victim's estimate of value of stolen jewelry sufficient for jury to find that state had proven value element necessary for larceny in third degree).

The defendant ignores *Baker* and *Felder* and attempts to distinguish *Sherman.* He correctly points out that, in *Sherman,* the state also introduced the jewelry itself into evidence, which permitted the jury "to corroborate the owner's estimate of its value," whereas, here, the watch in question was not in evidence (because it was never recovered), so that the jury could not "make its own inspection." D.Br. at 20; *see Sherman,* 127 Conn. App. at 394. The defendant is incorrect, however, in contending that, here, the state was required to produce either the stolen watch or "an appraiser, [or] a seller of similar items, [or] an independent owner or collector of Datejusts ... [or] documentary evidence" to corroborate David Frank's estimate of value. D.Br. at 19-20. This Court expressly rejected a similar argument in *Sherman*, 227 Conn. App. at 393 (rebuffing contention that "any testimony provided by the owner regarding the value of his or her property is incompetent unless the state also provides some sort of factual foundation in support of the testimony").

In addition, the defendant fails to recognize that other evidence buoyed David's estimate of his watch's value. As already explained, the defendant noted that the watch he brought to the Diamond Exchange had "a lot of diamonds," and he wanted Kirker to test them to be sure they were genuine. St.Ex. 20. After examining the watch under the microscope, Kirker told the defendant that the diamonds that she looked at "were definitely real." St.Ex. 20. David Schnee, the owner of the Diamond Exchange, testified that Rolex watches "are just a very desirable watch" and that gems on the watch would increase its value, "depending

upon the quality." T 6/19 at 10-11. Kirker's assurance that the diamonds she looked at were "definitely real" implied that they increased the value of the watch. This evidence, combined with David's estimate that the watch was worth $16,000, provided the jury with an evidentiary foundation on which to find beyond a reasonable doubt that the value of the stolen watch that the defendant possessed exceeded $10,000. *Sherman,* 127 Conn. App. at 394.

The defendant raises three additional "concerns" regarding the state's proof of value, none of which merit extended comment. First, he suggests that David's testimony was insufficient because he testified to the "worth" of the Datejust watches, not their "market value." D.Br. at 19-20. Our cases make no distinction between the terms "worth" and "value." *See, e.g., Baker,* 182 Conn. at 61-62 (victim's testimony that "six items of jewelry [were] worth $4950 and four time pieces [were] worth $1275" provided ample evidence for jury to find that "the market value of the stolen property exceed[ed] $2000"); *Sherman,* 127 Conn. App. 377 ("An owner may estimate the worth of his or her property.... The state does not need to prove the value of property with exactitude."); *Spikes,* 111 Conn. App. at 551 (same); *Felder,* 95 Conn. App. at 261 ("[T]he competence of a witness to testify to the value of property may be established by demonstrating that the witness owns the property in question. The rule establishing an owner's competence to testify reflects ... the common experience that an owner is familiar with her property and knows what it is worth....").

Second, the defendant claims that the "court's jury instructions on value" heightened "[c]oncern as to an erroneous verdict." D.Br. at 20. The defendant did not object or submit a request to charge concerning the court's instructions regarding the elements of value in counts three and five; nor did he adequately brief an instructional error claim. "Insofar as the defendant is now, on appeal, folding into his insufficiency claim an instructional error claim

that the court's charge misled the jury," this Court should decline to address it. *State v. Hearl,* 182 Conn. App. 237, 254 n.18, *cert. denied,* 330 Conn. 903 (2018); *see also State v. Dawson*, 188 Conn. App. 532, 565 (declining to review waived claim of instructional error folded into claim of prosecutorial impropriety), *cert. granted on other grounds,* 333 Conn. 906 (2019).

Third, the defendant asserts that a jury note during deliberations "about who possessed the diamond Rolex when it was seized" somehow showed the jury's confusion about ***value*** and suggested that the state's evidence of value was insufficient.[11] D.Br. at 21. This note reflected only that one or more jurors confused the Rolex Daytona, which was seized by the police, with the Rolex Datejust the defendant took to the Diamond Exchange, which was never recovered. The jury apparently resolved that confusion when it deliberated further and convicted the defendant of receiving stolen property.

Thus, the defendant's concerns do not vitiate the sufficiency of the evidence before the jury that the defendant received stolen property in excess of $10,000.

II. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT THE DEFENDANT KNEW OR BELIEVED THAT THE PROPERTY HE HAD WAS PROBABLY STOLEN.

As his fourth claim, the defendant contends that the evidence was insufficient for the jury to find beyond a reasonable doubt that he knew or believed that the diamond Datejust he possessed and took to the Diamond Exchange was probably stolen. To the contrary, ample evidence supported that finding.

A. Standard Of Review And Relevant Principles Of Law

The standard of review that this Court applies to claims of insufficient evidence is set

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[11] Soon after the jury began deliberating, it sent a note to the court asking "who had the diamond Rolex on them when it was seized by police." T 6/19 at 153. The court and the parties agreed to respond that "that's a question of fact for you to determine." *Id.*

forth in Section II.A.1., *supra.*

Under General Statutes § 53a-119(8), a "person is guilty of larceny by receiving stolen property if he receives, retains, or disposes of stolen property knowing that it has probably been stolen or believing that it has probably been stolen...." "Under the statute ... the mental element required is knowledge or belief that the property probably has been stolen, and ... the trier must ... find beyond a reasonable doubt that this element has been proved." *State v. Gabriel*, 192 Conn. 405, 415 (1984). "Ordinarily, guilty knowledge can be established only through an inference from other proved facts and circumstances." (Internal quotation marks omitted.) *State v. Rivera*, 39 Conn. App. 96, 104, *cert. denied,* 235 Conn. 921 (1995). The inference that the defendant had the requisite belief "may be drawn if the circumstances are such that a reasonable [person] of honest intentions, in the situation of the defendant, would have concluded that the property was stolen." *Id.* Absent a credible explanation, "possession of recently stolen property raises a permissible inference of [a] criminal connection with the property," either "as a principal in the theft, or as a receiver under the receiving statute, depending upon the other facts and circumstances which may be proven." *State v. Foster*, 45 Conn. App. 369, 376, *cert. denied,* 243 Conn. 904 (1997).

B. The Evidence Sufficed To Support The Jury's Finding That The Defendant Knew Or Believed The Rolex Datejust Was Probably Stolen.

When viewed in the light most favorable to sustaining the verdict, the evidence fully supported the jury's finding that the defendant knew or believed that the Rolex Datejust watch he possessed was probably stolen. The defendant gained possession of the watch and was found near the residence of his brother, Terrance Edwards, less than three days after Terrance broke into the Frank home and stole several items, including that particular watch. Absent a credible explanation, those circumstances alone permitted the jury to infer that the

defendant was a party to the theft, either as a principle or as a receiver. *Foster,* 45 Conn. App. at 376; *see also Johnson*, 165 Conn. App. at 275 (when evaluating evidence of defendant's intent, jury can rely on common sense, experience, and knowledge of human nature in drawing inferences).

The jury was not required to credit the defendant's various explanations to Detective Nivakoff. When first stopped near his brother's residence on January 23, 2017, the defendant lied to the police, stating that the Diamond Exchange card in his pocket related to his own Michael Kors watch, even though the card referred to an appraisal for a Rolex watch. *See* T 6/18 at 186-88; St.Ex. 19. He was evasive about where he lived. T 6/18 at 186-88. He mentioned nothing about the Rolex watch that he had taken to the Diamond Exchange that very day; nor did he mention any money that his brother owed him. *Id.* He claimed only that, although he and his brother "didn't get along," they were meeting for drinks. *Id.* He stated that he did not abuse Percocets but that his brother did. T 6/18 at 187.

Ten months later, after the police retrieved the defendant from Arizona, he again told Nivakoff that he did not get along with his brother, but this time he said that his brother had given him a Rolex watch to repay him for a debt. T 6/18 at 198. The defendant provided no innocent explanation for how his brother, who owed him money and abused drugs, came to have a $16,000 Rolex watch. From the defendant's vague and contradictory accounts as to why he possessed David's diamond Rolex watch, the jury presumptively inferred that he knew or believed that it was probably stolen. *See Jackson v. Virginia*, 443 U.S. 307, 326 (1997) (in evaluating sufficiency claims, courts must presume that jury resolved conflicts in evidence in favor of prosecution).

That the jury acquitted the defendant of the four charges alleging his direct

participation in the burglary, robbery, and assault at the Frank residence on January 20, 2017, did not preclude the jury from determining that the defendant knew about the robbery that his brother committed.[12] Despite the defendant's claim that he and his brother did not get along, when stopped on January 23, 2017, he was apparently on his way to have drinks with his brother. T 6/18 at 186-88. Significantly, the defendant betrayed his knowledge of the robbery and its aftermath through his unsolicited comment to Detective Nivakoff that "people were able to identify people from Facebook." T 6/18 at 189. Thus, the defendant's familiarity with how the robbery suspects were identified permitted the jury to infer that the defendant knew or believed that the watch he possessed was probably stolen. *See Jackson,* 443 U.S. at 326. In sum, the evidence was sufficient for the jury to conclude that "a reasonable [person] of honest intentions, in the situation of the defendant, would have concluded that the property was stolen."[13] *Rivera,* 39 Conn. App. at 104.

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[12] In fact, even though it acquitted the defendant of the first four charges, the jury could have determined that the defendant knew the watch was stolen because he was in the Frank home during the robbery. Both David and Samantha testified that the defendant was one of the two intruders. T 6/18 at 45-46, 55, 111, 117, 122-23. The jury could have relied on that evidence to conclude that the defendant had the knowledge or belief required for conviction of second degree larceny. *See generally State v. Blaine*, 168 Conn. App. 505, 512 (2016) (evidence sufficient to support conviction of conspiracy to commit robbery in the first degree, even though jury found defendant not guilty of murder, felony murder and attempted robbery), *aff'd,* 334 Conn. 298 (2019). Any inconsistency between the jury's acquittals on the first four counts and its conviction on the fifth count is not reviewable, in part because this Court has no way of knowing what prompted the inconsistent verdicts. *State v. Arroyo,* 292 Conn. 558, 585 (2009); *see also United States v. Powell,* 469 U.S. 57, 65 (1984) ("The fact that the inconsistency may be the result of lenity, coupled with the [g]overnment's inability to invoke review, suggests that inconsistent verdicts should not be reviewable").

[13] Contrary to the defendant's argument, nothing about the defendant's conduct at the Diamond Exchange prohibited the jury from concluding that he knew or believed that the Rolex watch with "a lot of diamonds" was probably stolen. D.Br. at 22-23. That the Diamond Exchange was a reputable business with high security indicates nothing about the defendant's knowledge or belief. Because the defendant appeared anxious to know the value of the watch and whether its diamonds were real, it made sense that he went to a reputable

III. THE TRIAL COURT PROPERLY ADMITTED DETECTIVE NIVAKOFF'S TESTIMONY THAT DAVID WAS ABLE TO IDENTIFY ITEMS IN THE DIAMOND EXCHANGE VIDEO; ALTERNATIVELY, ANY ERROR WAS HARMLESS.

As his first appellate issue, the defendant claims that the trial court erred in permitting Detective Nivakoff to testify, over defense counsel's hearsay objection, that David was able to identify items shown in State's Exhibit 20 as his. This claim should be rejected. No error occurred because the challenged testimony was admitted not for its truth but to show the course of the police investigation. In any event, any error was harmless.

A. Facts Relevant To This Claim.

David testified that three of his Rolex watches were stolen on January 20, 2017: a Daytona, which he bought for $11,000 and which the police recovered; and two Datejusts, which were not recovered. T 6/18 at 40-41, 53, 190; St.Ex. 6. One of the Datejusts had a black face, was an "oyster perpetual" with an "oyster band," an "80's model ... stainless," and was worth $5,000. T 6/18 at 40. The other Datejust was worth $16,000. T 6/18 at 40-41. David further testified, without objection, that when Detective Nivakoff showed him State's Exhibit 20, he recognized one of his watches: the "diamond Datejust." T 6/18 at 53-54.

During direct examination, Detective Nivakoff described the steps she took in investigating the robbery that occurred on January 20, 2017. T 6/18 at 167-90. She testified, *inter alia,* that, after the police found a card from the Diamond Exchange in the defendant's pocket, she went to that store, spoke with Kathleen Kirker, "who had the interaction with [the

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establishment. *See* St.Ex. 20. The defendant displayed a certain amount of urgency and nervousness in the video. When Kirker took the watch to the back room to examine it under the microscope, the defendant drifted back toward that room to watch, and met her as soon as she emerged from the back room. *Id.* He quickly denied that he wanted an appraisal for purposes of selling the watch, but he wanted to know whether Kirker had tested "all the diamonds, and asked her again if they were real. *Id.*

defendant], and ... obtained surveillance footage." T 6/18 at 190. Nivakoff identified State's Exhibit 20 as the surveillance footage she obtained from the Diamond Exchange, and the video was played for the jury. T 6/18 at 190-92. Nivakoff also testified that she showed the video to David. T 6/18 at 192. When the state asked whether David was able to identify items in that video as his, the following colloquy ensued:

> [DEFENSE COUNSEL]: Objection. Hearsay.
>
> THE COURT: What's your claim on that?
>
> [DEFENSE COUNSEL]: Asking --
>
> THE COURT: And hearsay, in other words, what David Frank identified.
>
> [DEFENSE COUNSEL]: Yeah.
>
> THE COURT: Yeah. What's your claim on that?
>
> [THE PROSECUTOR]: I'm just asking yes or no, did that happen?
>
> THE COURT: I'm going-- I'll allow yes or no.
>
> A Yeah.
>
> THE COURT: Go ahead.
>
> A I'm sorry. Yes, he did.

T 6/18 at 192-93. After this testimony, Nivakoff continued to describe the course of her investigation leading to the defendant's arrest. T 6/18 at 193-99.

B. Standard Of Review And Relevant Principles Of Law.

The standard of review for evidentiary claims is well-settled.

> To the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. [This Court] review[s] the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion. [O]nly after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally

> appropriate grounds related to the rule of evidence under which admission is being sought.

(Citation, ellipses, and internal quotation marks omitted.) *State v. Ayala*, 333 Conn. 225, 243 (2019).

"[A]bsent structural error, the mere fact that a trial court rendered an improper ruling does not entitle the party challenging that ruling to obtain a new trial. An improper ruling must also be harmful to justify such relief.... The harmfulness of an improper ruling is material irrespective of whether the ruling is subject to review under an abuse of discretion standard or a plenary review standard.... When the ruling at issue is not of constitutional dimensions, the party challenging the ruling bears the burden of proving harm." (Internal quotation marks omitted.) *State v. Toro*, 172 Conn. App. 810, 816, *cert. denied,* 327 Conn. 905 (2017).

Hearsay is defined in our Code of Evidence as "a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted." Conn. Code Evid. § 8-1 (3); *see also State v. Michael T.*, 194 Conn. App. 598, 611 (2019) (hearsay is "an out-of-court statement offered for the truth of the matter asserted..."). Testimony offered not for its truth but "only to explain how the police investigation proceeded" is not hearsay. (Internal quotation marks omitted.) *State v. Collymore*, 168 Conn. App. 847, 895 (2016) (collecting cases), *aff'd,* 334 Conn. 431 (2020); *see also State v. Daniels*, 191 Conn. App. 33, 61 (officer's statement that personnel at dealership were able to identify make and model of car shown in still photos from video was not offered for truth but was "used to demonstrate the route that the police took" in investigation), *state's cert. granted on other grounds*, 333 Conn. 918, *defendant's cert. dismissed,* 333 Conn. 918 (2019).

C. Nivakoff's Testimony That David Was Able To Identify Items In The Video As Belonging To Him Was Not Hearsay.

Nivakoff's testimony regarding David's identification of items in the video was not offered for its truth. As in *Collymore* and *Daniels,* the state's purpose in offering Detective Nivakoff's testimony was to identify the sequence of events in the investigation. Two circumstances reveal that purpose. First, Nivakoff's testimony that she showed the Diamond Exchange video (St.Ex. 20) to David and that he was able to identify items in in it as his; T 6/18 at 192-93; followed on the heels of David's own testimony that he had seen the video and had recognized his "diamond Datejust." T 6/18 at 53-54. Because the state had already elicited the substantive testimony from David, it did not need Nivakoff's statement for anything other than showing how she proceeded in investigating the robbery at the Frank home and obtaining a warrant for the defendant's arrest.

Second, in response to defense counsel's hearsay objection, the prosecutor explained that she was "just asking yes or no, did that happen." T 6/18 at 193. Thus, in questioning Nivakoff about whether David was able to identify property in the video as his, the state was not seeking to elicit ***what*** property David identified but only that he could identify "some items," a fact led Nivakoff to take further steps in investigating the robbery. Because the challenged testimony was not offered for its truth, it was admissible as non-hearsay.[14] *Daniels,* 191 Conn. App. at 61.

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[14] The defendant did not ask the trial court to explain its ruling or to give a limiting instruction, which precludes any claim that one should have been given here. A trial court generally is not obligated to give an instruction limiting the use of admitted evidence absent a specific request for a limiting instruction. *See State v. Cator*, 256 Conn. 785, 801 (2001); *State v. Elias V.*, 168 Conn. App. 321, 338, *cert. denied,* 323 Conn. 938 (2016).

D. Alternatively, Any Error Was Harmless.

Even if this Court finds, or assumes without deciding, that the trial court improperly admitted a hearsay statement through Nivakoff's testimony, the defendant cannot prevail because he has not shown harm. *Toro*, 172 Conn. App. at 816; *see also Ayala,* 333 Conn. at 232 (reviewing court can resolve evidentiary issue solely on basis of harm).

> [W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. Most importantly, we must examine the impact of the ... evidence on the trier of fact and the result of the trial. [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict.

(Ellipses and internal quotation marks omitted.) *Ayala*, 333 Conn. at 231–32.

In this case "the weight of the state's evidence absent the contested testimony," and "the fact that the challenged testimony largely was cumulative" of other evidence defeat the defendant's claim of harmful error. *State v. Johnson*, 171 Conn. App. 328, 339, *cert. denied,* 325 Conn. 911 (2017). Before Nivakoff testified, the state had already elicited testimony from David that the intruders stole three of his Rolex watches and that the defendant was holding one of his watches – the diamond Datejust – in the Diamond Exchange video. T 6/18 at 53-54. The video itself showed the defendant asking for an appraisal of a watch that the gemologist at the Diamond Exchange identified as a Rolex. St.Ex. 20 (2:30-2:46, 3:52-3:58). Moreover, the defendant admitted to Detective Nivakoff that Terrance, the other suspect in the Frank robbery, gave him a Rolex in lieu of payment on a debt, which the defendant took to the Diamond Exchange to obtain an appraisal. T 6/18 at 198. This evidence, without

Nivakoff's more general testimony that David was able to identify "items" in the video as his, was more than sufficient to show that the defendant possessed property belonging to David.

The defendant asserts that, even though David had already testified that he recognized his diamond Datejust in the Diamond Exchange video, Nivakoff's testimony was harmful because the prosecutor used the plural term "items" in her question, and Nivakoff answered, "Yes." D.Br. at 13. Without the reference to "items," the defendant contends, "the $10,000 threshold for larceny-two offenses was not satisfied." *Id.* This claim is meritless. For the reasons that follow, this Court can have fair assurance that the jury's verdict was not substantially swayed by the word "items," as opposed to "item."

For its charge in Count 5 – larceny in the second degree by receiving stolen property – the state relied on the defendant's possession of a single item in the Diamond Exchange video: the diamond Datejust that David identified as his and that the defendant tried to have appraised. The state twice argued in its closing that the Diamond Exchange video showed the defendant "in the store getting ***a*** Rolex watch that belong[ed] to David Frank ... appraised ... to see what the value is." (Emphasis added.) T 6/19 at 54; *see also* T 6/19 at 63 ("You have the footage from the American Diamond Exchange showing an individual with what David Frank identified as his stolen Rolex going into there[,] asking for an appraisal on ***a*** Rolex ..., asking if the diamonds are real, what's the value of ***this***." [emphasis added]). Thus, the jury would have looked only to the value of that watch to determine whether it exceed $10,000 as required for conviction of larceny in the second degree.[15] Contrary to the

[15] Although State's Exhibit 20 showed that the defendant had two watches, no evidence at trial linked the smaller watch to the Franks, and there was no testimony as to its value. The defendant asked Kirker to check the diamonds on and to appraise only the larger watch. As argued in Section I, *supra,* the evidence was sufficient for the jury to determine that the value of that watch alone exceeded $10,000 as required for second degree larceny.

defendant's suggestion, the jury would not have speculated from Nivakoff's testimony that David had identified more than one item in the video as his and that the state met the value threshold necessary for second degree larceny only by adding the value of those items together. Consequently, the defendant did not prove that any evidentiary error was harmful.

IV. THE TRIAL COURT PROPERLY PRECLUDED THE DEFENDANT FROM FURTHER CROSS-EXAMINING SAMANTHA ABOUT A 2017 FELONY CONVICTION; ALTERNATIVELY, ANY ERROR WAS HARMLESS.

The defendant's fifth appellate issue is purely evidentiary. Without claiming any constitutional violation, the defendant asserts that the trial court erred in precluding him from further examining Samantha as to the details of her arrest on July 5, 2017, about six months after the robbery, leading to her conviction for improper storage of controlled substances in violation of General Statutes § 21a-257. D.Br. at 25-28. In the defendant's view, further cross-examination regarding her arrest would have showed the jury that Samantha lied under oath when she testified at trial that she had stopped selling drugs after the incident at her home on January 20, 2017. D.Br. at 25-26. He also claims that prohibiting the defense from exposing that lie was harmful because Samantha's testimony was key to the jury's decision to convict him of larceny in the second degree by receiving stolen property. D.Br. at 27-28. The defendant is wrong on both counts. The trial court acted well within its broad discretion in prohibiting the defendant from delving into the specifics of Samantha's arrest in July 2017, and, if any error occurred at all, it was harmless.

A. Facts Relevant To This Claim

Before Samantha testified, the parties argued the state's motion in limine to preclude the defense from cross-examining her on the details of her criminal record. The court ruled that the defendant could mention that Samantha had been convicted of an unnamed felony

in Bridgeport on November 2, 2017, an unnamed felony in Virginia on May 9, 2009, two unnamed felonies in Florida on January 24, 2008, and another an unnamed felony in Florida on November 20, 2007. T 6/18 at 79-80. The defendant was also permitted to ask Samantha if she was convicted of shoplifting in New Jersey in 2015. T 6/18 at 80.

When Samantha testified on direct, she admitted to having been convicted of the crimes mentioned above. T 6/18 at 84-85. She also testified to selling drugs from her New Haven home; T 6/18 at 86-96, 113; and to purchasing cocaine from Terrance Edwards on one occasion and giving him "medication" for Dijon on another. T 6/18 at 89. Samantha maintained that, after the incident at her home, she did not continue to sell pills because "I got robbed. It was dangerous. I was dealing with bad people." T 6/18 at 113.

During Samantha's cross-examination, she again admitted to having five felony convictions from three different states and to shoplifting in New Jersey. T 6/18 at 123-24. She further admitted to lying to the police throughout the investigation. *Id.* She insisted that she stopped selling pills after the robbery. T 6/18 at 134-35. Outside the presence of the jury, defense counsel asked for permission to cross-examine Samantha about the arrest leading to her November 2, 2017 conviction for illegal storage of narcotics. T 6/18 at 141. The state objected to any further inquiry, arguing that the details of the arrest constituted a collateral issue that would require testimony from the arresting officer and an "expert ... on possession with intent to sell." T 6/18 at 143-44.

During an offer of proof, the defendant elicited from Samantha that, on July 5, 2017, she was arrested on her way back from New York with a large number of pills in her purse: 148 Alprazolam; 40 Risperdal; 82 acetaminophen & hydrocodone; 125 TEVA diazepam. T 6/18 at 145-47. She also had $1600 in cash. T 6/17 at 146-47. She testified that she had

purchased the drugs at an illegal drug store in New York for her own use and was not selling anything. *Id.* She explained that she planned to consume the pills over a month or two. T 6/18 at 148. She further testified that the cash was from her husband's paving job and was in her purse so that she could pay bills. T 6/18 at 147, 151-52.

Defense counsel argued that he should be able to present these details to the jury because, if the state "is going to establish that after date of robbery she never dealt in pills again[,] it seems to me a very logical inference is [that] the possession of so many pills and so much money is an indication that she [was] dealing and ... I think the jury should hear about that...." T 6/18 at 152. The trial court ruled as follows:

> She testified, and the jury is going to assess her credibility, counsel, that she hasn't sold pills since January 20th, 2017, the date of this incident.
>
> She has indicated in this offer of proof that the pills that she purchased in New York were for her own personal use over the course of time, a few months or whatever, and that's her testimony.... And from what's in front of me now, ... I'm not going to allow ... your claimed underlying facts of her arrest ...; she has admitted to the felony there, but again it's not a sale, it's a possession case.

T 6/18 at 152.

When the jury returned, Samantha again testified that she had not dealt drugs since the date of the robbery and again admitted that she was convicted of a felony after the robbery. T 6/18 at 153. She further testified that she told Marcel, one of her Percocet customers, that she planned to go to New York to get more drugs after the police interviewed her on January 23, 2017. T 6/18 at 154-55. She also admitted that, after her New York trip, she sold pills to Marcel, explaining:

> [T]he night that I got robbed they took everything, money and pills. I had to go back ... and get pills for my personal use because I was getting very ill, so when I got the pills I had some leftover that I needed to sell because I had no money.
>
> ***

> I went to [N]ew York I purchased ... I picked up my pills, my medication, I came home, Marcel came over ... Yeah, he must've came over, he picked up some medication and that was it. That was the last time I seen him....
>
> Yes, [I] illegally sold him drugs.

T 6/18 at 159-60. Samantha told the jury that that final transaction "must've slipped [her] mind" when the prosecutor asked her if she sold drugs illegally after the date of the robbery, and she agreed with defense counsel that she sold drugs again, "right after the police interviewed me ... but I haven't sold drugs since then...." T 6/18 at 161.

B. Standard Of Review And Relevant Principles Of Law

The standard of review for evidentiary claims is well-settled.

> [This Court] review[s] the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law ... for an abuse of discretion.... The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination.... Thus, [this Court] will make every reasonable presumption in favor of upholding the trial court's [rulings on these bases].

State v. Taupier, 330 Conn. 149, 181 (2018), *cert. denied*, 139 S. Ct. 1188 (2019).

Several sections of the Connecticut Code of Evidence bear on the defendant's claim. Section 4-5(a) prohibits admission of "other crimes, wrongs or acts ... to prove the bad character, propensity, or criminal tendencies" of an individual. Under § 4-5(c), such evidence is admissible only "to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony." Under § 6-6(b)(1),

> [a] witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness. The right to cross-examine a witness concerning specific acts of misconduct is limited in three distinct ways. First, cross-examination may only extend to specific acts of misconduct other than a felony conviction if those acts bear a special significance upon the [issue] of veracity.... Second, [w]hether to permit cross-examination as to particular acts of misconduct ... lies largely within the discretion of the trial court.... Third, extrinsic evidence of such acts is

inadmissible....

(Internal quotation marks omitted.) *State v. Martinez*, 171 Conn. App. 702, 734–35, *cert. denied,* 325 Conn. 925 (2017).

In addition, § 6-7(a) of the Code of Evidence provides that

> [f]or the purpose of impeaching the credibility of a witness, evidence that a witness has been convicted of a crime is admissible if the crime was punishable by imprisonment for more than one year. In determining whether to admit evidence of a conviction, the court shall consider: (1) the extent of the prejudice likely to arise; (2) the significance of the particular crime in indicating untruthfulness; and (3) the remoteness in time of the conviction.

Under 6-7(c), when, for impeaching a witness's credibility,

> evidence is introduced that the witness has been convicted of a crime, the court shall limit the evidence to the name of the crime and when and where the conviction was rendered, except that (1) the court may exclude evidence of the name of the crime and (2) if the witness denies the conviction, the court may permit evidence of the punishment imposed.

C. The Trial Court Did Not Abuse Its Discretion In Prohibiting The Defendant From Inquiring Into Samantha's Arrest To Suggest That She Was Lying About A Collateral Issue.

The trial court properly exercised its discretion in precluding the defendant from eliciting the facts surrounding Samantha's arrest in 2017, i.e., that she was found with large quantities of prescription medicine and cash in her purse. Such facts were not admissible under § 4-5 of the Code of Evidence because they were not offered for any of the purposes listed under subsection (c). Similarly, under § 6-7, the facts of the ***arrest*** were not admissible to impeach Samantha's credibility; only the fact that she was convicted of a felony. Finally, although the trial court could have exercised its discretion to admit such evidence under § 6-6(b)(1) to show Samantha's character for untruthfulness, it was not required to do so. *See, e.g., State v. Annulli,* 309 *Conn.* 482, 496 (2013); *Martinez,* 171 Conn. App. at 735-36.

Here, the defendant proffered the evidence concerning Samantha's arrest in July 2017

in an attempt to show that Samantha lied when she testified at trial that she no longer sold narcotics after the robbery. The trial court reasonably determined that that issue did not merit a minitrial of Samantha because it was, at best, tangential, to the critical issue in the defendant's trial – whether he had robbed the Franks on January 20, 2017. As the trial court pointed out, Samantha testified in the offer of proof that the drugs she possessed when arrested in July were for her own consumption, not to sell. To then prove that she was lying about not selling drugs after the robbery the defendant would have had to introduce expert testimony that someone with the quantity of drugs and cash that Samantha had was likely selling them, which may have led the state to call another expert in rebuttal, resulting in an extensive expenditure of time and resources concerning an issue of minimal probative value. *See Annulli,* 309 Conn at 496-98 (trial court reasonably precluded inquiry into collateral matter of whether victim had previously lied about threats from classmate).

Moreover, the trial court gave the defendant full rein to impeach Samantha's credibility by eliciting, *inter alia,* that: (1) she had five felony convictions based on her conduct in three different states and had also been convicted of shoplifting in yet another state; (2) she lied to police multiple times during the investigation of the robbery; and (3) contrary to her own testimony, she sold drugs to Marcel the day after her police interview. Under these circumstances, the trial court properly precluded the defendant from cross-examining Samantha about the facts of her July 2017 arrest.

D. Any Error Was Harmless.

As already explained, "a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." *Ayala*, 333 Conn. at 232. In this case, Samantha's extensive criminal record, her lies to police during the

investigation, her vague and contradictory answers on direct examination, and the defendant's effective cross-examination destroyed any credibility she may have had with the jury. Additional evidence that she may have lied under oath about not selling drugs again after the robbery was entirely unnecessary. That the jurors did not believe Samantha is evident from the fact that they acquitted the defendant of four of the five charges against him.

Moreover, the defendant's conviction for receiving stolen property depended almost exclusively on David's and Nivakoff's testimony and the surveillance video from the Diamond Exchange. Contrary to the defendant's assertion that Samantha's testimony "provided several links in the chain of evidence that suggested" the defendant knew the watch had been stolen; D.Br. at 28; Samantha added little, if anything, to David's testimony on that issue and to the defendant's own statements to Nivakoff. Therefore, the defendant has failed to show harm resulting from precluding inquiry into the facts of Samantha's 2017 arrest.

V. THE TRIAL COURT PROPERLY INSTRUCTED ON REASONABLE DOUBT.

Lastly, the defendant contends that the trial court committed structural error in instructing the jury, in accordance with the Connecticut Criminal Jury Instructions, that a reasonable doubt is "such a doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance." D.Br. at 28-30. In the defendant's view, the two words "upon it" render the entire instruction on reasonable doubt "nonsensical." D.Br. at 29-30. In particular, he asserts that the instruction as written suggests that a reasonable doubt is one that "is ephemeral, fleeting, baseless, and downright silly (i.e. the kind of doubt [that] would cause a reasonable person to hesitate long and hard before acting on)...." D.Br. at 29. This claim is meritless. The use of the prepositional phrase "upon it" does not, as the defendant claims, cause the "hesitate to act" sentence of the reasonable doubt instruction to mean

"almost" the opposite of what it should. D.Br. at 29. "Upon it" refers to "the doubt," and, in the context of the entire instruction, that phrase clarifies that, because of the doubt, a reasonable person would hesitate to act. *See* Crim. Jury Inst. 2.2-3 (State's Appendix at A7).

A. Facts Relevant To This Claim

Before trial, the defendant asked the trial court to remove from the standard jury instruction on reasonable doubt the prepositional phrase "upon it," and submitted a lengthy memorandum in support of its request. D/A at A20-A28. At the charging conference, the trial court stated that it had considered and rejected the defendant's request to charge on the reasonable doubt. T 6/19 at 4. The court announced that it would "use the charge recommended on [the state's] [j]udicial [w]ebsite on the definition of beyond a reasonable doubt." *Id.* Before the court charged the jury, the defendant again objected to the court's proposed instruction on reasonable doubt. T 6/19 at 99.

During its charge to the jury, the trial court instructed on reasonable doubt as follows:

> The phrase reasonable doubt has no technical or unusual meaning. The meaning of reasonable doubt can be arrived at by emphasizing the word reasonable. It is not a surmise, a guess, or mere conjecture.
>
> It is such a doubt as, in the serious affairs that concern you, you would heed; that is, such a doubt as would cause reasonable men and women to hesitate to act ***upon it*** in matters of importance.... It is not hesitation springing from any feelings of ... pity or sympathy for the accused, or any other person who might be affected by your decision. It is, in other words, a real doubt, an honest doubt, a doubt that has its foundation in the evidence or lack of evidence. It is doubt that is honestly entertained and is reasonable in light of the evidence after a fair comparison and careful examination of the entire evidence.

(Emphasis added.) T 6/19 at 109-10. The court's instruction followed Instruction 2.2-3 of the Connecticut Criminal Jury Instructions.

B. Standard Of Review And Relevant Principles Of Law

The state bears the burden of proving the defendant's guilt beyond a reasonable

doubt. *In re Winship*, 397 U.S. 358, 364 (1970). "Consequently, the defendant in a criminal case is entitled to a clear and unequivocal charge by the court that the guilt of the defendant must be proved beyond a reasonable doubt...." (Brackets and internal quotation marks omitted.) *State v. Jackson*, 283 Conn. 111, 117 (2007). A "claim that the court's reasonable doubt instruction diluted the state's burden of proof and impermissibly burdened the defendant is of constitutional magnitude." *State v. Holley*, 174 Conn. App. 488, 493, *cert. denied,* 327 Conn. 907 (2017), *cert. denied*, 138 S.Ct. 1012 (2018).

> A challenge to the validity of jury instructions presents a question of law over which this court has plenary review. ... It is well settled that jury instructions are to be reviewed in their entirety. ... When the challenge to a jury instruction is of constitutional magnitude, the standard of review is whether it is reasonably possible that the jury [was] misled.... In determining whether it was ... reasonably possible that the jury was misled by the ... instructions, the charge to the jury is not to be critically dissected for the purpose of discovering possible inaccuracies of statement.... Individual instructions also are not to be judged in artificial isolation. ... Instead, [t]he test to be applied ... is whether the charge ... as a whole, presents the case to the jury so that no injustice will result.

(Internal quotation marks omitted.) *Id.* at 493–94; *see also Jackson*, 283 Conn. at 117.

C. The Reasonable Doubt Instruction Was Proper

As defense counsel acknowledges; D.Br. at 29; he advanced the identical argument raised here in *State v. Holley*, 174 Conn. App. at 494-95. This Court rejected that argument, and our Supreme Court declined further review. *Id., cert. denied,* 307 Conn. at 907. As this Court pointed out in *Holley,* our Supreme Court has repeatedly "upheld the use of instructions that utilized the very ["upon it"] language the defendant challenges." *Id.* Accordingly, this Court also held that, as an intermediate court of appeal, it was "unable to overrule, reevaluate, or reexamine controlling precedent of our Supreme Court." *Id.*

Nothing has changed since the decision in *Holley*. Our Supreme Court has not chosen to reexamine the numerous cases in which it either expressly approved the use of "upon it"

in the reasonable doubt instruction or denied review of Appellate Court cases that approved that language. *See, e.g., State v. Winfrey*, 302 Conn. 195, 218 (2011) (instruction explaining that reasonable doubt is "such doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance" not constitutionally infirm); *State v. Mark R.*, 300 Conn. 590, 616–17 (2011) ("this court has rejected virtually identical claims on multiple occasions"); *State v. Johnson*, 288 Conn. 236, 288–90 (2008) (rejecting challenge to instruction describing reasonable doubt as "such a doubt as would cause reasonable [people] to hesitate to act upon it in matters of importance"); *State v. Delvalle*, 250 Conn. 466, 474 n.11, 473–75 (1999) (same); *Holley,* 174 Conn. App. at 492-95 (rejecting claim that instruction with "upon it" language dilutes state's burden of proof), *cert. denied,* 327 Conn. at 907*; State v. Hernandez*, 91 Conn. App. 169, 178–79 (not improper to instruct jury that reasonable doubt is "doubt as would cause reasonable men and women to hesitate to act upon it in matters of importance"), *cert. denied*, 276 Conn. 912 (2005); *State v. Otero*, 49 Conn. App. 459, 470–74 (same), *cert. denied*, 247 Conn. 910 (1998). As this Court remains unable to overrule controlling precedent of our Supreme Court, the defendant's challenge to the reasonable doubt instruction must fail.

If somehow, this Court decides that it can reach the merits of the defendant's claim of instructional error, it must reject that claim. In fixating on the two words "upon it" in the standard instruction on reasonable doubt, the defendant loses sight of the first principles of instructional review. It is well established that this Court does not assess "individual jury instructions in artificial isolation[;]" rather, they "must be viewed in the context of the overall charge." (Internal quotation marks omitted.) *Jackson*, 283 Conn. at 117. Accordingly, when reviewing constitutional challenges to jury instructions, this Court considers the whole charge

"from the standpoint of its effect on the [jurors] in guiding them to the proper verdict" and does "not critically dissect[ ]" it "in a microscopic search for possible error . . . ." (Internal quotation marks omitted.) *Id.* (reversing Appellate Court's decision concluding that reasonable doubt instruction that varied from standard instruction impermissibly diluted state's burden of proof).

The defendant's challenge to the singular use of the prepositional phrase "upon it" appearing in one sentence of the reasonable doubt instruction is the epitome of "a microscopic search for . . . error" and, as such, it cannot, and does not, constitute reversible error. In the context of the entire instruction, the sentence that the defendant challenges properly conveys that a reasonable doubt is one that would cause a reasonable person to hesitate before acting upon matters of importance. This is a correct statement of law. *See Holland v. United States*, 348 U.S. 121, 140 (1954) (citing with approval instruction given in *Bishop v. United States*, 107 F.2d 297, 303 (D.C. Cir. 1939), which defined reasonable doubt as "doubt [that] would cause reasonable men to hesitate to act upon it in matters of importance to themselves"). Consequently, there is no reasonable possibility that the instruction as given misled the jury. *Winfrey,* 302 Conn. at 218.

CONCLUSION

For all of the foregoing reasons, the State of Connecticut-Appellee asks this Court to affirm the trial court's judgment of conviction.

Respectfully submitted,

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

(4) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) the brief complies with all provisions of this rule.

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